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Supreme Court of the United States

October Term, 1937

No. 10

OCEAN BEACH HEIGHTS, INC.
NORMANDY BEACH DEVELOPMENT COMPANY, ET AL.,
Petitioners,

versus

THE BROWN CRUMMER INVESTMENT COMPANY, TOWN OF NORTH MIAMI, ET AL.,
Respondents

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENTS

I

Opinions Below

The opinion of the Circuit Court of Appeals in this case is reported in 87 Fed. (2d), pages 978 to 981. The opinion of the District Court on motion to dismiss the bill is reported in 11 Fed. Supp., page 73. Other opinions relating to the same controversy are reported in 11 Fed. Supp., page 69, and 69 Fed. (2d) 105.

II

Jurisdiction

Jurisdiction of the Federal Court was invoked by complainant, a citizen of Kansas, in a suit at law against the town, a Florida municipal corporation, upon bonds and coupons issued by the town. This suit is in equity:

(1) Ancillary to the judgment of the Federal Court in the suit at law and is in aid of the execution of a peremptory writ of mandamus issued by the Federal Court to enforce payment of such judgment, and

(2) A class suit under Federal Equity Rule 38 on behalf of all bondholders of the town to restrain defendant taxpayers from utilizing a judgment of ouster and an injunctive decree obtained in the State Court in suits against the municipality to which no bondholder was a party, to interfere with the levy of taxes by the town and its officials for the payment of the principal and interest accrued and to accrue upon bonds issued by the town; on the ground that the enforcement of the decrees of the State Court would impair the obligation of the bond contracts of the town, would deprive complainant and other bondholders of their property without due process of law contrary to the Constitutions of Florida and of the United States; and would be contrary to the recognized principles of equity and standards of good conduct.

III

Statement of the Case

The City of Miami, the largest winter resort in the Eastern section of the United States, was in 1926 the center of a real estate boom. Property adjacent to its limits had a speculative value because it was within the bounds of future

expansion. The owners of territory adjacent to and North of the City of Miami, acting under the general statutes of Florida, organized a town under the name of Miami Shores (since changed to North Miami) including lands on both sides of Bay Biscayne. The purpose of such incorporation was to provide municipal facilities and avoid the high rate of taxation that would have resulted if the territory had been annexed to Miami or Miami Beach.

The town was organized in 1926 under Sections 1825 to 1928 of the Rev. Gen. Stats. of Florida of 1920, Sections 5106 to 5112, Compiled General Laws of Florida, 1927. It issued bonds, of which $238,000 principal were outstanding at the time the bill was filed. Principal in the amount of $88,000 and interest amounting to $50,145 was past due. The answers of Ocean Beach Heights and Normandy Beach Development Company who are owners of property East of the Bay, admit the incorporation, the validity of the statutes under which the town was organized, that the town attempted to include the area of land East of the Bay, and that it exercised all of its functions and powers over land West of the Bay. (R 65). The Master, (R 368) and the District Judge, (R 379) found that the town also exercised municipal functions over all territory *East of the Bay* by collecting garbage, providing police and fire protection, repairing streets, enforcing building restrictions, issuing building permits, etc. The Master and the District Judge specifically found, (R 371-2) that the town assessed, levied and collected taxes from the *entire area (both East and West of the Bay) included in the act of incorporation from the date of its organization down to and including the year* 1934. See assessed values, tax levies and collections, (R 37-2 and 383-4). No testimony was offered by the Defendant to contradict the evidence of the Complainant. We especially call attention to Plaintiff's Exhibit 5 (R 237-42) showing that Ocean Beach Heights by its present attorney, Judge Sutherland, in April, 1929, applied to the Town Council for a change in location of Collins Avenue. The Council authorized

the change upon representations to it that improvements amounting, in value, to five or ten million dollars would be made upon the property. We also call attention to Plaintiff's Exhibits 2 and 3 (R 211 and 224). Ocean Beach Heights purchased its property from Tatum's Ocean Park Company in July, 1929. That Company in its sworn bill of complaint, filed in the Circuit Court October 22nd, 1927, admitted that its property was within the town of Miami Shores. Normandy Development Company also swore to a bill of complaint which admitted that its property was within the town.

By 1928 the boom was over and taxes began to be a burden. In July 1929 the Attorney General, in the name of the State of Florida, at the request of certain taxpayers who were joined as co-relators, among them being Normandy Beach Development Company, instituted an action of quo warranto in the State Court to oust the city and its officials from jurisdiction over land East of Bay Biscayne. (R 84-92). Ocean Beach Heights was not one of the relators. Its predecessor in title, Tatum's Ocean Park Company, later became a party by intervention by an order dated December 17th, 1931, (R 343). The town and its officials filed an answer to the information, (R 306-326) motion for judgment notwithstanding was filed, (R 327) and an order for judgment, (R 329). Judgment of ouster was rendered March 31st, 1930, (R 335).

From this judgment a writ of error was taken to the Supreme Court of Florida, (R 336), and that Court by its mandate, (R 338) reversed the judgment of ouster, (Opinion reported in 133 So. 90, 101 Fla. 1254). The case was tried December 17th, 1931 and the Circuit Judge directed a verdict in favor of the relator and co-relators (R 353-5) holding that the attempted inclusion of lands East of Bay Biscayne in said town was "illegal, null and void and without warrant or authority of law". Motion for a new trial, (R 356-8) was overruled, (R 359) and no appeal was taken from that judgment.

On July 8, 1930 (Complainant) Respondent instituted a suit at law against the town in the District Court of the United States upon nine past due bonds and ninety-three past due coupons, (R 286). One bond was of an issue dated March 1, 1928; one was of another issue dated March 1, 1928; seven were of an issue dated April 1, 1927. The coupons were from bonds dated January 1, 1927 (R 286-93). Final judgment in the sum of $11,790.00 was entered against the town June 19, 1931 (R 283). No appeal was taken from this judgment. On October 7, 1931 the judgment creditor (Respondent) obtained from the District Court of the United States an alternative writ of mandamus requiring the city and its officials to levy a tax for the payment of the judgment (R 13). Before the peremptory writ was issued, certain persons owning property East of the Bay applied to the District Judge for leave to intervene in the mandamus proceeding. Leave to intervene was granted. Answers were filed and parts of them were stricken by order of the District Judge. See opinion in United States ex rel Brown Crummer Inv. Co. v. Town of North Miami, 11 Fed. Supp. 69. Testimony was taken and the District Judge, following his opinion, (R 44) issued a peremptory writ January 24, 1933, (R 203), commanding the town and its officials

> "to levy a tax on all taxable, assessable property within said Town of North Miami, formerly Miami Shores, including the property described in paragraph 6 of the alternative writ of mandamus more particularly described as"

(then follows a description of the property lying East of the Bay according to the metes and bounds description used in the Information) (R 303-4). Property owners appealed to the Circuit Court of Appeals from the peremptory writ. Their appeal was dismissed. Normandy Beach Development Co. et al v. United States ex rel Brown Crummer Inv. Co., 69 Fed. (2d) 105. Neither the town nor its officials entered an appeal. The peremptory writ has been final since January 24, 1933 *and no further attack has been made upon the peremptory writ by any property owner.* The record

(R 185-87) and Exhibits 13, 14, 15, 16 and 17, (R 254-82) show that the town continued to levy taxes against all assessable property, including the property East of the Bay, and no proceedings were ever instituted to restrain such levy or the enforcement of such taxes until a bill was filed in Alta Cliff v. Leatherman. In April, 1933 a special levy of 4½ mills on all property, both East and West of the Bay was made in response to the writ expressly for the judgment creditor. (R 252, Ex. 12). A large part of that tax levy was collected.

The judgment creditor (Respondent) filed this bill of complaint in the District Court for the Southern District of Florida on December 1, 1934 (R 1). The purposes of the bill are shown in the prayer (R 22-25); for an injunction to restrain the taxpayers named as defendants from preventing the assessment, levy and collection of taxes which might be levied by the town for the payment of the judgment or for the payment of interest and principal upon any bonds that had been issued by the town, to enjoin the town officials from refusing or failing to perform the duties in the levy and collection of taxes required by the peremptory writ and by the contract contained in the bonds; and to restrain the prosecution of certain actions that had been instituted by Defendants in the State Court, and the enforcement of the injunction issued in Alta Cliff Company v. Leatherman (affirmed by the Supreme Court of Florida March 31st, 1934, 153 So. 845, 114 Fla. 305).

Answers were filed by the town and its officials (R 29-48), by Ocean Beach Heights (R 64-103), and by Normandy Beach Development Company (R 105-123). Testimony was taken. Master's Report was made (R 368) and final decree was rendered by the District Judge (R 389) granting the prayers of the bill. Defendants appealed to the Circuit Court of Appeals (R 403), which affirmed the decree of the District Court (R 429 et seq.).

IV.

The Issues Involved

The record presents no issue of fact. The findings of the Master (R 368 et seq.) and the findings of fact and conclusions of law of the District Judge (R 378 et seq.) disposed of all such issues. The issues here are of law.

The case presents a twofold aspect.

1. By Complainant in its own right as the holder of an unpaid judgment obtained in the Federal Court against the town, to enforce payment of which a peremptory writ of mandamus has been issued commanding the officials of the town to levy a tax against all of the taxable property which was included within its boundaries as fixed by the act of incorporation. Complainant individually seeks to enjoin the use by Defendants of the judgment of ouster and the injunction issued by the State Court for the purpose of preventing compliance by the officials of the town with the commands of the peremptory writ. The bill in this aspect is *ancillary to the writ* of mandamus and in *aid of its execution.*

2. The bill also presents a case under Rule 38 of the Federal Equity Rules - a class suit brought on behalf of all bondholders of the town to protect the town officials in the levy and collection of taxes for the payment of principal and interest accruing upon the bonds, whether reduced to judgment or not, from the effect of the State Court's decrees. In this aspect the bill is an original one.

V.

Argument

1.

The Bill, as ancillary to the judgment at law and the peremptory writ of mandamus, is brought to protect process of the Federal Court.

The question raised by the bill in this respect is:

> Whether a Federal Court that has issued a peremptory writ of mandamus commanding the officials of a town to levy a tax against *all of the taxable property included within the boundaries* of a town as fixed by its act of incorporation, can enjoin interference with the duties required of the town officials by the writ to be performed although such interference results from a judgment of a State Court ousting the officials of the town from jurisdiction over part of the area or from an injunction by the State Court restraining the enforcement of taxes in such area, the judgment creditor not having been a party to either suit in the State Court.

Complainant having obtained a judgment in the Federal Court which is now final (R 283) and having obtained a peremptory writ of mandamus to enforce payment of the judgment, (R 203) (Plaintiff's Exhibit 1) the writ being final, this proceeding is ancillary to the judgment and to the writ, to protect the officials of the City in the performance of the duties required of them by the writ, - namely the levy and collection of taxes from the entire area that was within the boundaries of the town.

The bonds described in the first three counts of the declaration (R 286-291) recited that they were issued "in strict conformity with the Constition and Laws of Florida"; that "for the payment of the same the full faith and credit of the Town of Miami Shores was pledged"; that "*provision was made for the levy and collection each year*, while any of said bonds were outstanding and unpaid, *of sufficient*

taxes on all taxable property in said town to pay the principal and interest". The bonds described in the fourth count (R 292) recite that the issuance of them had been approved at an election held in compliance with the Laws of Florida;

> "that all acts, conditions and things required to exist or be done precedent to and in the issuance of this bond, under the Constitution and Laws of Florida, had happened, existed and been performed",

and that

> "provision *had been made for the levy and collection of a direct annual tax upon all taxable property within said town,* sufficient to pay the interest and principal of this bond as the same shall become due".

All of these bonds were "validated and confirmed by decrees of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida" (R 286-293). Plaintiff's Exhibit 4 (R 295). The Charter of the City and Chapter 9298, Acts of 1923, authorized the issuance of these bonds. Therefore, the peremptory writ (R 203-10) requiring the levy of a tax

> *"on all taxable, assessable property within said town of North Miami, formerly Miami Shores, which would produce a sum sufficient to pay the judgment"*,

merely required performance of the pledges contained in the bonds for the purpose of enforcing payment of the judgment. The property specially described in the writ is the property East of the Bay and was "within the town" of Miami Shores when its bonds were issued (R 302). The writ therefore only commanded the City to do that which it was obligated to do.

By the judgment at law (Entered June 19, 1931 (R 283) and which was unlimited, and by the alternative writ (Issued October 7th, 1931) plaintiff acquired vested rights before judgment of ouster was entered by the State Court (December 18th, 1931). City of Memphis v. U. S. ex rel Brown, 97 U. S. 293, 24 L. Ed. 920.

A writ of mandamus to compel the levy of a tax to pay a judgment

> "cannot be had on application to a ministerial officer. It can only issue after a judgment of the Court to that effect in an independent adversary proceeding instituted for that special purpose. Such a judgment is a final judgment in a civil action".

Davies, et al. v. U. S. ex rel Corbin, et al, 112 U. S. 36 (p. 40), 28 L. Ed. 627.

Being a final judgment, a right of appeal existed. No appeal was taken by the town or its officials. No proceeding has ever been filed by the town or its officials to seek a modification of the terms of the writ. No direct attack has ever been made upon the peremptory writ by a property owner.

Therefore, since the judgment upon the bonds and coupons and the judgment embodied in the peremptory writ have long since become final as against all parties, it can not be *collaterally attacked* in this or any other proceeding. Cushman, et al. v. Warren-Scharf Asphalt Paving Company, 220 Fed. 857 (7 C. C. A.).

The effort of appellant to interfere with the enforcement of the peremptory writ is a collateral attack upon it.

> "A proceeding to enforce a judgment is collateral to the judgment and therefore no inquiry into its regularity or validity could be permitted in such a proceeding, whether it is a direct action on the judgment, ... or proceedings supplementary to execution, or bill in equity in aid of execution",

34 Corpus Juris, Section 828, pp. 522, 528.

In a proceeding by mandamus to compel the payment of a judgment or to compel the levy and collection of a tax to provide funds for payment, the judgment can not be questioned for such amounts to a collateral attack. Santa Fe County v. New Mexico, 215 U. S. 296, 54 L. Ed. 202;

Harshman v. Knox County, 122 U. S. 306, 30 L. Ed. 1152; United States ex rel Ranger v. New Orleans, 98 U. S. 381, 25 L. Ed. 225; City of Davenport v. U. S. ex rel Lord, 76 U. S. 409 19 L. Ed. 704.

In the same way any attack in this case upon the writ is collateral and is prohibited by the authorities cited. Complainant (Respondent) therefore had the right to apply to this Court for ancillary or supplemental relief to prohibit third parties acting under orders of a State Court from interfering with its process.

Protection of process of a Federal Court against interference by individuals or officials acting under the authority of State Court process, is an inherent right of the Federal Court, necessary to preserve its existence.

A writ of mandamus issued by a Federal Court pursuant to a judgment rendered by it against a municipality is neither a "prerogative writ nor a new suit". It is

> "a proceeding ancillary to the judgment which gives the jurisdiction and when issued becomes *a substitute for the ordinary process of execution to enforce the payment of the same,* as provided in the contract".

Since the

> "writ of mandamus is a remedy ancillary to the judgment and *is the proper process to enforce the payment of the same,* then there is an end of the argument, as it could not be contended that a State Court can enjoin such process of a Federal Court".

U. S. ex rel Riggs v. Johnson County, 73 U. S. 166, 18 L. Ed. 768. Other cases to the same effect are U. S. ex rel Weber v. Lee County, 73 U. S. 210, 18 L. Ed. 781; U. S. ex rel Thomas v. Keokuk, 73 U. S. 518, 18 L. Ed. 918; U. S. ex rel Moses v. Keokuk, 73 U. S. 514, 18 L. Ed. 933; Lee County v. Rogers, 74 U. S. 181, 19 L. Ed. 160.

Where the Relator to the writ was not a party to a proceeding in the State Court "it is not competent for a State

tribunal to paralyze process issued from the Court of the United States to give effect to its judgment". City of Davenport v. U. S. ex rel Lord, 76 U. S. 409, 19 L. Ed. 704

Even where a State Court has issued an injunction against the collection taxes before Relator obtains judgment in the Federal Court, the jurisdiction of the Federal Court having attached when the suit was filed, its right to issue is not affected. Washington County v. U. S. Ex rel Durant, 76 U. S. 415, 19 L. Ed. 732.

An injunction of a State Court restraining the collection of taxes is a nullity insofar as it purports to effect or interfere with process of a Federal Court issued to enforce payment of a judgment against the City. Amy v. Barkholder, 78 U. S. 136, 20 L. Ed. 101.

2.

The Bill in Its Original Aspect
Points of Law

The case is also a class suit brought under Federal Equity Rule 38, on behalf of Complainant and on behalf of "all other bondholders" (R 1) to obtain an order from this Court restraining defendant taxpayers from utilizing the judgment of ouster and the injunction decree to prevent the officials of the town from taking the steps and performing the acts necessary to pay the bonds and coupons issued by the town. A decision of this question involves the merits of the case. The points upon which we urge affirmance of the decision of the Circuit Court of Appeals are:

A. That the decisions of the State Court in Mahood et al v. State ex rel Davis, 101 Fla. 1254, 133 So. 90 and Leatherman et al v. Alta Cliff Company, 114 Fla. 305, 153 So. 845 were made after the bonds of the town were issued in cases to which neither this Complainant nor any other

bondholder was a party and the rights of bondholders against the town and its taxpayers were neither adjudicated, considered or even discussed therein.

B. The decrees of the State Circuit Court validating the bonds, having become final before the bonds were issued, are res adjudicata against the state and the taxpayers of the question of whether the property East of the Bay was within the boundary of the municipality.

C. Petitioners are estopped by matters in pais from denying, in an action by bondholders, that their lands were within the boundary of the municipality at the time the bonds were issued and cannot defeat the right of bondholders to have taxes levied against their lands for the payment of the bonds and coupons, where it appears that without such power, the town is unable to pay the debts so incurred.

D. The lands East of the Bay were de facto within the municipality at the time the bonds of the town were issued and as such were bound to the same extent as if they were de jure within the limits.

E. The dissenting opinion of Judge Sibley is predicated upon erroneous assumptions of law and of fact.

POINT A

Federal Court Not Bound to Follow Decisions of Florida Court

The principal argument made for reversal of the decision of the Court of Appeals is that the judgments and the decrees of the State Court in Mahood v. State, supra, and Leatherman v. Alta Cliff Company, supra, "must be followed by the Federal Court".

The argument when analyzed is a patent attempt to evade the real issue of law. Defendants do not have the effrontery to claim that the rights of bondholders have been

adjudicated by these decisions nor that these decisions of the State Court would, under the doctrine of "stare decisis" even control the Florida Supreme Court if this case were pending there. They admit that neither the complainant or any other bondholder was a party to the actions in the State Court and that they were not represented there. They could not have been. The quo warranto action was brought by the State of Florida out of the relation of the Attorney General joined by certain taxpayers, against the town and its officials. The injunction suit in the Alta Cliff case was predicated solely on the judgment of ouster and was brought by taxpayers against the Clerk of the Circuit Court and the town officials. The record in this case does not even show that the facts in evidence in the cases in the State Court were similar to the facts proved here or that those cases presented the same issues raised in this case. This Court must presume, therefore, that the facts and issues were not the same.

The duty of Federal Courts to follow decisions of State Courts arises primarily from the Conformity Act, Section 34, now Section 725 of Title 28 of the Judicial Code, but the purpose of the rule was to secure uniformity of rights and remedies in State and Federal Courts. If the decision of the State Court in those cases would not preclude consideration by it of the merits of a suit such as this, the claim that the Federal Court must, in this case, "follow the decisions of the State Court", is meaningless. The mere fact that this action is in a Federal Court does not of itself inhibit such Court from deciding the merits of the case, absent any estoppel by judgment or plea of res adjudicata.

Our position is that the rights of bondholders in this case must be decided upon the merits of the case made by them; that the fact the State Court has decided controversies arising between *taxpayers* and *town officials* subsequent to the issuance of the bonds, does not prevent this Court from *deciding the rights of bondholders* upon facts here

presented when it appears that no bondholders were parties to the State Court suits. This Court made this distinction in Chase National Bank v. Norwalk 291 U. S. 431, 78 L. Ed. 894, when it held that a judgment of ouster rendered by a State Court against a mortgagor did not bind a mortgagee whose interest was acquired before the commencement of the suit by the State unless it had been a party defendant to the ouster suit. For "the mortgagee is entitled to have a decision determining *his rights* rendered *on the basis of the facts and considerations adduced by him*". Even if a bondholder had been a party to one of the suits in the State Court this Court would have exercised its right to examine the record of the former case to see whether the issues were identical and, if they were not, would have decided this case according to its own independent judgment. "Obviously, the facts and circumstances affecting the trustees' (mortgagees') rights may be different from those presented to the State Court on behalf of the power company". Chase National Bank v. Norwalk, supra.

The position of municipal bondholders, while not identical, is analagous to that of mortgagees. The Supreme Court of Florida said in City of Clearwater v. State 108 Fla. 623, 147 So. 459:

> "Where bonds have been issued by a municipality with a provision for the levy of stipulated taxes to provide for their payment, the fund contracted to be raised by the agreed taxes is the foundation upon which the bonds themselves rest. The annual tax is the security offered to the creditors who take bonds under laws which constitute a special agreement on the part of the public corporation debtor to provide for their payment according to terms. And as the Supreme Court of the United States has said in the case of Louisiana v. Pilsbury 105 U. S. 278, 26 L. Ed. 1090; the annual tax ..... could not be afterward severed from the contract without violating its stipulations, any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as no part of the transact-

> ion. In other words, such bonds are but the present funding of the *necessary future* taxes contracted to be levied, in order to pay them off in due course, as to the stipulated principal and interest..... Bonds when issued are merely an anticipation of the taxes agreed to be provided to pay them".

We assert that the Supreme Court of Florida has held that rights of bondholders are not and *cannot be affected by a judgment of ouster* dissolving a municipal corporation in toto or excluding a part of its area where ouster proceedings are instituted after bonds have been issued and validated by the Courts of Florida.

In Humphreys et al v. State ex rel. Palm Beach Co. 108 Fla. 92, 145 So. 858, the Legislature had divided a town into two towns and had apportioned its indebtedness. The holders of bonds issued by the old town were granted a peremptory writ of mandamus requiring the levy of taxes by the officials of both towns against all property which was "within the town" (the original town) as it had existed at the time the bonds were issued. A note to the opinion says that "within said town" means "within it as it was defined a town by the then existing provisions of law". In other words the pledge ofa tax levy upon all taxable property "within the town" was held inseparable from the obligation. It is true that exclusion of a part of the lands of Boynton was by legislative act, while in this case exclusion is by judicial decree, but the principle underlying the decision is the same.

But as was said by the Texas Supreme Court in Payne v. First National Bank, 291 S. W. 209

> "The provisions of the State Constitution and of the statutes passed pursuant thereto conferring jurisdiction in quo warranto proceedings upon the District Court, will not be interpreted as embracing power to impair the obligations of valid contracts".

The Circuit Judge who entered the first judgment of ouster in this case, (R 334) said that "there were ample provisions by law and in equity to take care of" the bonded indebtedness of the town.

In State v. Coral Gables, 120 Fla. 492, 163 So. 308, a proceeding in quo warranto, Justice Buford, though he was of the opinion that the entire act of annexation was void, took pains to state that

> "the questions of the levy and collection of taxes to pay bonds *could not be adjudicated in this case because the bondholders are not parties*".

In Hillsborough County v. State, 113 Fla. 345, 151 So. 712 the Supreme Court, though it refused to validate refunding bonds of the county, because of the attack made upon the original bonds, held that it could not decide the rights of the original bondholders in the validation action because such holders were not parties.

In State v. Avon Park, 108 Fla. 641, 149 So. 409, an action in quo warranto, the Court expressly held that

> "as the bondholders are not party to this action then their rights, if any, with reference to lands included within the municipality when the bonds were issued, *are not affected* by the adjudication of this cause".

But we bottom our contention primarily upon the decision of the Florida Supreme Court in State v. Cedar Key, 122 Fla. 454, 165 So. 672, a parallel case. The Town of Cedar Key was incorporated under Chapter 6673, Acts of 1913, Chapter 9698, Acts of 1923 abolished the 1913 town and created the City of Cedar Key which embraced the same territory as that included by the act of 1913. The boundaries of the town of 1913 and the city of 1923 were more extensive than they had been under the old charter of 1890.

In 1934 an action of quo warranto was filed in the State Court and a final judgment of ouster was entered against the city and its officials on the ground that the acts

of 1913 and of 1923 were both void. Prior to the institution of that suit the city had in 1925 issued bonds while the act of 1923 was in force. A writ of mandamus was sought by a bondholder to enforce the levy of taxes to pay these bonds. The Court granted the peremptory writ, saying

> "Our conclusion is that as against the defense herein set up, the writ of mandamus must be awarded for the reason that the circuit court judgment of ouster rendered in a proceedings to which the relator bondholder was not a party, and by the result of which he did not become bound under the doctrine of virtual representation, cannot avail the respondents as a defense against the right asserted by relator to have such respondents judicially ordered to levy, assess, and collect the taxes undertaken by them to be pledged for the payment of the bonds and coupons issued by the city of Cedar Key, at a time when the said city of Cedar Key was at least a de facto municipal corporation whose status as a putative de jure corporation had not been duly challenged by the State of Florida at the time the city's bonds and coupons were floated and sold".

> "The judgment in quo warranto relied on as a defense in this case must therefore be construed as having been rendered by the circuit court in the light of section 5109, C. G. L., supra, and as not having any legal effect as an avoidance of the obligations validated or as an obstacle to the ordinary remedies available to a holder thereof for their enforcement against the municipality obligor thereon".

> "Such quo warranto judgment, as we have seen, must be construed as having a prospective operation only, in so far as past incurred and duly validated municipal bonds of the ousted or dissolved municipal corporation is concerned; no claim being made that the bonds in question are beyond the constitutional power of the State Legislature to authorize on the part of the municipality in any circumstnaces by mere legislation. The judgment in the quo warranto proceeding is to be presumed, as a matter of law, not to call in question matters expressly or impliedly settled or adjudicated in the bond validation proceed-

ing, the result of which, under section 5109, C. G. L. section 3299, R. G. S. could not be subsequently called into question indirectly in any Florida court, whether by means of a quo warranto suit or otherwise, instituted in the name of the state, or in the name of any other party bound by the decree of validation through actual or virtual representation in that cause".

The opinion distinguished between the right of the *state and taxpayers* to question the validity of charter acts and *the right of bondholders* to enforce the levy of taxes against property which was within the putative boundaries of the town at the time the bonds were issued, especially where the bonds had been validated by a decree of a court before action was begun by the State to attack the incorporation. The Court held that a judgment in quo warranto must be construed, "as having a prospective operation only, insofar as past incurred and duly validated bonds of ousted or dissolved municipal corporations is concerned". So the Court of Appeals in this case, following the decision in the Cedar Key case held that under the facts in this case the judgment of ouster not being binding upon the bondholders, "spoke only as to the future, determined that only from and after the ouster, the town did not exist de jure in the excluded territory".

Other State Courts have made similar holdings. We cite particularly People ex rel Mercer v. Zearing 305 Ill. 503, 137 N. E. 481 and Bray v. Payne 210 Cal. 465, 292 Pac. 478, as well as the text in Second Edition American and English Encyclopedia of Law, Volume 23, pages 628-9.

Petitioners' only means of escape from the effect of these decisions is by the claim that the last paragraph of the opinion in the Cedar Key case, (as they say in their brief) (Petitioner's brief, p. 11) *"saved the rights of individual property owners who might be able to show that their lands were never lawfully included within the city"*. Let the opinion of the Florida Court speak for itself. We quote that paragraph of the opinion:

> "If any question of territorial boundaries for the application of the taxing power commanded to be exercised on the part of the de facto municipal corporation of the City of Cedar Key should arise, it should be duly adjudicated *at the instance of such individual complainants as may be able to prove that they were at no time ever within the orbit of the respondent municipality's exercise of complete jurisdiction as an actually functioning de facto municipality claiming to be the City of Cedar Key prior to the judgment of ouster*".

If this exception had the effect of saving the right of all whose lands were not "lawfully included within the city" (the language of petitioners), none of the lands that had been added to the town of Cedar Key by the Acts of 1913 and 1923 would be subject to tax for the Circuit Court had held that none of them had been "lawfully included". The real holding of the Court was that *only lands that were at no time within the orbit of the municipality's exercise of corporate jurisdiction as an actually functioning, de facto municipality, claiming to be the City of Cedar Key, prior to the judgment of ouster* were to receive consideration. This statement is consistent with the entire context of the opinion.

The record in this case discloses that the defendants did not prove or even attempt to prove that their lands were never "within the orbit of the municipality's exercise of jurisdiction", nor that "the actually functioning de facto municipality of Miami Shores" did not claim to be a municipality, nor that it did not

> "exercise jurisdiction over the lands of the petitioner prior to the judgment of ouster"

and since. On the contrary, the Master, the District Judge and the Circuit Court of Appeals *affirmatively held* that the municipality of Miami Shores claiming to be such, actually did exercise municipal powers *over all of the territory included within its tentative boundaries up to the time of the filing of the information without objection*, and even

continued to exercise many of its functions until after the final judgment of ouster without objection other than the prosecution of the proceeding in quo warranto. The statement of Petitioner's brief that the language of the Florida Court is "just exactly what we have here" is misleading and finds no basis in the record. It is directly contrary to the evidence, to the findings of the Master and the District Judge, and to the opinion of the majority of the Court of Appeals. Even under that paragraph of the opinion of the Florida Court, Defendant's argument falls.

POINT B

Validation Decrees of State Court Are Res Adjudicata

Moreover that Petitioner's lands were within the town had been *conclusively determined by a final decree of the State Court before the bonds were issued.* The opinion of the District Judge and that of the Circuit Court of Appeals repeatedly refer to the decree validating the bonds of the town but do not place the emphasis upon them that we think they should receive. The Master found (R 370-1) that the bonds had been authorized, decrees of validation of all issues were entered by the Circuit Court and no taxpayer interposed any objections to the same nor filed any proceeding to restrain the issuance of the bonds or expenditure of the proceeds. This finding was confirmed by the District Judge (R 381).

The sole purpose of the validation statute of Florida was to secure an adjudication of the validity of bonds as an inducement to purchasers and as an assurance to them that all legal questions had been disposed of. The extent to which the Georgia Court has gone in sustaining such a decree is illustrated in Gibbs v. Ty Ty Consol. School Dist., 147 S. E. 765. The Florida statute was copied from the Georgia statute.

The Supreme Court of Mississippi in Love v. Mayor of Yazoo City, 138 So. 600 said that the

> "main purpose of Chapter 10, Code 1930 (validation Act) was to have the validation of the bonds determined in order that the bonds so validated might be readily sold in the market, to create in the mind of the bond buyer a sense of security, in that by the decree of the court and the fiat of the Legislature there could be no further attack upon the validity of the bond issue."

Neither the Constitution of Florida nor the validation act reserve, either in the Court or the Legislature, power to alter or change the rights of purchasers of bonds after validation.

Section 5, Art. VI of the Constitution of Florida limits the legislative power to alter municipal boundaries by requiring it to make provision for payment of the town's debts. This requirement would be violated by an act excluding lands representing sixty per cent of the assessed value as much so as if the entire corporation was abolished. To say that the Legislature could not exclude these lands, but that they could be excluded by the same Court that validated the bonds would make a mockery out of constitutional provisions intended to protect the rights of creditors of municipalities. As Judge Ritter pointedly held, the security of the bonds would be destroyed by whittling away the territory as much so as by an open attempt at repudiation. The Court of Appeals said that

> "the same question is presented as to the liability of territory excluded from a municipality in ouster proceedings as is presented when a municipality is ousted from jurisdiction over all its territory."

The Florida validation Statute, Chapter 6868, Acts of 1915, has been repeatedly construed. The petition for validation was directed against "the State of Florida". It was

served upon the States Attorney of the Judicial Circuit in which the proceedings were pending. He was required to

> "carefully examine the petition and to make such defense to the same as shall seem proper."

Notice was published to all taxpayers and citizens to show cause, why the bonds should not be validated; by publication of the notice all taxpayers and citizens were

> "considered as parties defendant to said proceedings, and the Court shall have jurisdiction of the same as if they were named in said petition and personally served with process."

The decree of validation is

> "forever conclusive . . . . . against the city and all taxpayers and citizens thereof; and the validity of said bonds shall never be called into question in this State". Comp. Gen. Laws 1927, Sec. 5106-09.

The bonds (R. 296) pledged "the full faith and credit of the town of Miami Shores" and that

> "provision has been made for the levy and collection each year while any of said bonds are outstanding and unpaid of sufficient taxes *on all taxable property in said Town to pay the principal and interest of this bond and the other bonds of this issue as the same become due and payable so far as such taxes may be necessary for that purpose.*"

They contracted "to levy taxes on all taxable property *with in said town*". This pledge, as well as the power of the the town to issue bonds was approved by the decree of validation in a suit to which the State of Florida and all property owners were parties. The decision of the Florida Court against the State and taxpayers was a direct inducement to the purchasers. It is res adjudicata against the State and the taxpayers. A contrary decision would violate the good faith of the State of Florida, of the town officials and of the Circuit Court of the Eleventh Judicial Circuit.

Thompson v. Frostproof, 89 Fla. 92, 103 So. 118, said that

> "the purpose of a decree validating and confirming bonds thereunder is to put in repose any question of law or fact that may be subsequently raised affecting the validity of such bonds. This being our deduction, it is a necessary corollary that in a bond validating suit any question that goes *to the power to issue* and *validity* or *regularity* of the issuance of such bonds is proper to be raised in said suit. In this view we are supported by Smith v. Mayor, etc., of City of Dublin, supra, where the Court in effect said that while a proceeding to validate a proposed issue of bonds is a judicial one, it is a prescribed method *to ascertain in advance of the issue whether the bonds when issued shall bear on their face the imprint that they have been tested and not found wanting in any particular; this imprint renders further inquiry into their validity unavailing and the property of the taxpayers must be the source of payment.*"

The decree of validation was reversed because bonds could not be voted where the streets to be paved did not exist.

Weinberger v. Board of Public Instruction, 93 Fla. 470, 112 So. 253.

> "Any matter or thing affecting the power or authority of the several political subdivisions mentioned in section 3296, Rev. Gen. Stats. 1920 to issue bonds, or the regularity or legality of their issue, including questions of both law and fact, insofar as those matters or things could be lawfully prescribed, regulated, limited, or dispensed with by the Legislation in the first instance, or subsequently cured by a validating act, may be put in repose by a decree rendered pursuant to section 3296 et seq., Rev. Gen. Stats. 1920. So, also, may constitutional rights or privileges which are designed solely for the protection of the property rights of the individual concerned, and which he may waive, or with reference to which he may estop himself, or as to which the Legislature

may lawfully limit the period of time within which they may be exercised. Such an adjudication of the several matters just referred to is forever conclusive upon the persons and political subdivisions mentioned in sections 3296 et seq., and all such persons and bodies are thereafter forever barred from again raising those questions with respect to the bonds as to which the adjudication was made. In other words, any defect or irregularity which may be waived or to which an estoppel may apply, and which does not render the proceeding a nullity and therefore void ad initio and incapable of subsequent legislative ratification or validation, may be adjudicated in the validation proceeding under the statute, and if such defects or irregularities are not raised in that proceeding they are forever and conclusively settled with respect to the bonds therein involved."

This statement of the Court is important because *it determines the line of distinction between matters which are adjudicated and those which are not.* Issue of these bonds was enjoined because they did not mature as required by express mandatory provisions of the State Constitution.

In Abell v. Boynton, 95 Fla. 984, 117 So. 507, a bill in chancery to restrain the collection of special assessments was dismissed because the bonds had been validated. Decision was predicated on Fort Myers v. State, 95 Fla. 704, 117 So. 97, a validation proceeding in which the Court held that as the assessments were void, the bonds could not be validated.

In Bay County v. State, 116 Fla. 656, 157 So. 1, and in State v. Citrus County, 116 Fla. 676, 157 So. 4, the Florida Court has held that a decree of validation should not be entered where the resolution authorizing refunding bonds attempts to pledge security which could not be legally pledged.

The Circuit Court of Appeals of the Fifth Circuit in Green v. Uniacke, 46 Fed. (2d), 916 held that the validating decree was conclusive against taxpayers even though the

legality of the drainage district could not have been raised in the validation proceeding. Referring to the Statute the Court said:

> "Under this provision such a decree, which involves no violation of a constitutional provision, is conclusive as to the validity of the bonds dealt with therein putting in repose anything affecting the authority of their maker to issue them, or the regularity or legality of the issue, having the effect of making the question of the validity of the bonds res adjudicata, and preventing further litigation as to that question."

Decisions of Florida and other courts dealing with this subject are collated in notes in 87 A.L.R. 716 and 102 A.L.R. 107.

The effect of these decisions is that a judgment of validation unreversed is conclusive as to all parties to a suit and those in privity. Barse v. Whaley, 102 Fla. 404, 135 So. 879. Parties to a suit are concluded by a judgment as to all rights or acts that have been tried and also as to all those for which an opportunity for trial was given. Hay v. Salisbury, 92 Fla. 446, 109 So. 617.

A judgment on the merits is not only conclusive as to all matters determined but also as to

> "matters which might or ought to have been settled and on all questions necessarily involved or which could have been presented."

Prall v. Prall, 58 Fla. 496, 50 So. 867, and State v. Wright, 107 Fla. 178, 145 So. 598.

In Sauls v. Freeman, 24 Fla. 209, 4 So. 525, the Florida Court held that the taxpayers of a county were concluded by a judgment against the county, not only as to every matter that was offered and received to defeat the claim but also as to every other matter that might have been received for either purpose. Even though county officials

failed to prove facts that otherwise might have been a defense the issuance of the peremptory writ was held binding on the town and on taxpayers so as to prevent them from maintaining a bill in chancery to restrain the officials from taking the action commanded by the writ of mandamus.

In Fidelity National Bank and Trust Co. v. Swope 274 U. S. 123, 71 L. Ed. 959, this Court held that a statute of Missouri authorizing the validation of paving liens authorized

> "the Court to examine and determine the validity and effect of the legislative action in establishing the benefit district. The result of the proceeding is to establish judicially as against the property owners in the district the validity of such action and of the liens established or to be established conformably to the statute on the specific property described."

That such judgment was binding upon the taxpayer even though the procedure was a modified form where the parties were reversed and the issues were raised at the behest of the city.

Weinberger v. Board of Public Instruction, supra, held that a validation decree was as effective as a statutory validation, and this Court in C. H. & N. Railway Company v. Wells, et al, 260 U. S. 8, 27 L. Ed. 100 sustained the validity of an act validating certain road district bonds although the act was passed during the pendency of the suit, on the ground that

> "What the Legislature could have authorized it can ratify, if it can authorize at the time of ratification".

The Supreme Court of Florida admitted that the Legislature could have authorized the inclusion of all of the territory within the town because such was not prohibited by the Constitution. Therefore a validation act by the Legislature

would have been constitutional and what could have been validated by the Legislature could be and was validated by the decree of the Circuit Court.

The Supreme Court of Mississippi construing its validation statute has repeatedly held that a decree of validation is res adjudicata against the state and the taxpayers as to the boundaries of school districts. See Williams v. Board of Supervisors of DeSoto County, 139 Miss. 78, 103 So. 812; Von Zondt v. Town of Braxton, 146 Miss. 461, 115 So. 557; Love v. Mayor of Yazoo City, supra. In Williams v. Board of Supervisors of De Soto County, supra, the Court held that the decree was binding on the theory of res adjudicata. That case is cited with approval in the Von Zondt case where we find the following statements:

> "The attack here on the validity of the order creating the taxing district, and of the order by which its limits were extended, is collateral, and therefore inadmissible under the cases hereinbefore cited."

and

> "The cause of action may here be, and we will assume is, different from the one in the case wherein the bonds were validated; nevertheless the judgment there rendered is res adjudicata here, for the rule is that in a second action between the same parties, or their privies, although the causes of action may be different, the judgment in the first action is res judicata in the second as to any point or question actually litigated and determined in the first."

Board of Education, Town of Carmen, Okla. v. James, 49 Fed. (2d) 91, Tenth Circuit, held that the very purpose of the validation proceeding in Oklahoma was to "furnish a readily available record, beyond which the bond buyer need not inquire," citing an earlier case, and that bondholders

> "had a right to rely on the adjudication in the funding judgment, upon the fact that the bonds were signed by the court which rendered such judgment,

upon the certificate of the Attorney General, and upon the fact that no proceedings had been brought to contest the validity of such bonds within thirty days after the date of such certificate. We conclude that the defendants are precluded by the judgment in the funding proceeding."

Our argument on this point is reinforced by the principle announced by this Court in Gelpcke v. Dubuque, 68 U. S. 175, 17 L. Ed. 520, which has been followed and applied by this and other Courts. In State ex rel Brown v. C. & L. R. R. 13 S. C. 290 the Supreme Court of South Carolina followed it where there had been a previous adjudication though it was not a bond validation proceeding, and held that the former opinion was res adjudicata of the question against the state and taxpayer. An even broader application of this doctrine was accorded it by the Supreme Court of Florida in Columbia County v. King 13 Fla. 451. In that case the Court said:

"It is also proper to observe that the case of Cotton v. the Commissioners of Leon county, was pending if not already decided by the Supreme Court, at the very moment that the earliest of the bonds of Columbia County were being issued, and they thus went forth upon the market and into the hands of third parties, not only sanctioned by the Legislature, but by the Judicial branch of the government, and thus they were treated and accepted by the world as having the very highest and strongest indorsement as to their validity, and the decision of the court in that case seems to have been acquiesced in by the people of the various counties, who were then about issuing their bonds under the same law and for the same purposes; and it does not appear that any steps were taken to enjoin the *issuing* of any of the bonds then about to be issued by the several counties, Columbia being one of them."

and again:

"Whatever, therefore, might have been the opinions of the members of this court upon the question of the constitutionality of the law referred to, the fact that the bonds were issued and passed to the

hands of third parties long years ago, that they were sanctioned by the judicial department of the government, and by the acquiescense of the people, it would be an outrage upon public justice, public credit and the rights of the holders for value of these bonds now to step in and nullify the solemn adjudication of the highest court of this State, given when these bonds were about being issued, and upon the faith of which they were sold for the means used to promote an important public enterprise, and intended to develop and enhance the prosperity and value of property of the citizens of the State."

The Gelpcke case has been repeatedly followed with approval by this Court, the last time being in Loeb v. Columbia Township 179 U. S. 472, 45 L. Ed. 280.

POINT C

Petitioners Are Estopped to Deny That Their Lands Are Within the Town of North Miami (Formerly Miami Shores)

But even if this Court should be of the opinion that the decree of validation is not of itself res adjudicata against the State and the property owners, the decree is a material fact to be considered as an additional circumstance in pais which should estop petitioners from denying that their lands are legally within the boundaries of the municipality. There can be no doubt but that property owners can be estopped and lose constitutional rights "intended for the protection of property rights". See Weinberger v. Board, supra. The opinion of the Circuit Court of Appeals and that of the District Judge describe in detail the matters in pais which in their opinion should estop these petitioners from asserting the defense here sought to be interposed. The opinion of the Supreme Court of Florida in Weinberger v. Board 93 Fla. 470, 112 So. 253, follows in language and holding a decision of this Court in Shepard v. Barron, 194 U. S. L. Ed. 1115.

"Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision and where it would be unjust to others to permit it to be set up."

The pleadings and the record show that the owners of property East of the Bay made no objection to the inclusion of their lands in the town or to the exercise of the town's jurisdiction over their property, or to the fact that the town obligated their lands for the payment of the bonds, until after bonds had been validated and issued. Even the State may preclude itself by estoppel from objecting to the legality of the inclusion of lands in a municipality where there has been long acquiesence and recognition. Cooley's Constitutional Limitation, Eighth Edition, pages 531-2. The Florida Court has repeatedly enforced this rule and has refused to issue writs of quo warranto, where there has been long delay and rights of third parties have accrued in reliance upon apparent acquiescence by the State and taxpayers. State v. Eau Gallie 99 Fla. 579, 126 So. 124; State v. Fort Lauderdale 102 Fla. 1019, 136 So. 889; State v. Clearwater 106 Fla. 761, 139 So. 377; State v. Coral Gables 120 Fla. 492, 163 So. 308; State v. Auburndale 121 Fla. 336, 163 So. 698; State v. Haines City 126 Fla. 561, 169 So. 383; State v. Winter Haven 125 Fla. 392, 170 So. 100; Haines City v. Haines City Heights, Inc., 126 Fla. 772, 172 So. 484; Gulfport v. State 104 Fla. 245, 140 So. 192.

Clapp v. Otoe County, 104 Fed. 473, (Text 482) said:

"There is another reason why the defense which we have been considering cannot be sustained. It is that the general acquiescence by the inhabitants of a political subdivision organized under color of law, and by the departments and officers of the state and county having official relations with it, gives to the acts and contracts of those officers on its behalf as a subdivision all the force and validity of their acts in its behalf as a subdivision de jure. The acts of ordin-

ary municipal bodies organized under color of law depend for more upon general acqiesence than upon the legality of their action for the existence of every condition precedent prescribed by the statutes under which organize and act. The interest of the public which depend upon such municipalities and their various subdivisions the rights and relation of private citizens which become fixed in reliance upon their existence, the injustice and confusion which must result from an ex post facto avoidance of their acts, commend the justice and demand the enforcement of the rule that when a municipal body or a political subdivision of a state or county has, or its officers have, assumed, under color of authority, and have exercised for a considerable period of time, with the consent of the state and its citizens, powers of a kind recognized by the organic law, neither the corporation, subdivision, nor any private party can, in private litigation, question the legality of the existence of the corporation or subdivision".

Some of the Florida cases cited do not refer to the validation decrees, but such decrees and the failure of taxpayers to object to the sale of the bonds and disposition of the proceeds are facts that should be considered in determining whether estoppel exists. This is not a question of whether the lands were legally included within the town but it is whether taxpayers are estopped to deny that they were, because of the injury that would otherwise result to innocent third parties. The opinion of Judge Ritter discusses the relative positions of taxpayers and bondholders.

POINT D

The Town at the Time the Bonds were Issued, was de facto existent over entire area.

The Court of Appeals in its majority opinion chose to treat this case from the standpoint of existence of a de facto corporation over the entire area. In this it has a precedent which has been cited with authority by numerous Federal Courts. Clapp v. Otoe County, 104 Fed. 473 opinion by Judge Sanborn, Certiorari denied 180 U. S. 638,

45 L. Ed. 710. The facts in that case very closely resemble those in the present case, as the legality of a precinct was attacked on the ground that its boundaries contravened statutes authorizing its creation. The Court said:

> "When these bonds were issued and sold, every citizen of the territory comprised within the order of October 4, 1886, and called 'Nebraska City Precinct,' *and every piece of property* therein, was represented by the board of county commissioners of Otoe county in all the proceedings which culminated in the issue of these bonds. That board was the agent of these citizens and this property, under the statutes, to borrow the money which they voted to obtain upon the bonds. Under the color of law, it constituted the precinct, called the election, issued the bonds, and no man objected. Under these circumstances, Nebraska City precinct was a precinct de facto, and the board of county commissioners were its governing officers de facto, and the silence and general acquiescence of the private citizens within it and the officers of the state and county, until after the rights of the bondholders had vested, estop them from questioning the existence of the precinct, or the validity of the acts of these officers, as against the purchasers of the bonds. The acts of these officers have all the force of the acts of officers de jure for a precinct legally constituted, and the owners of the property within the boundaries of the order of the board of county commissioners of October 4, 1886, are estopped, by their silence and acquiescence, from *denying that the property within those limits is liable to taxation to raise the necessary amount to pay these bonds.*"

Petitioners claim that in Florida a municipal corporation de facto could not exist. The argument assumes that there was no valid law, yet Petitioners admit that the statutes authorizing incorporation of the town are valid and their attack upon the boundaries is based solely on the application of the statute to the circumstances as they existed. The Florida Supreme Court in West v. Lake Placid, 97 Fla. 127, 124 So. 361, held that the Town of Lake Placid was "at least a municipality de facto" because the duties of local government had been assumed and active use of the fran-

chise had been made with the acquiescence of the inhabitants. Yet in its later decisions dealing with the charter of this town (118 Fla. 874 158 So. 497 and 121 Fla. 683, 164 So. 531), it held that the statute of incorporation was absolutely void. Other cases recognizing the de facto existence of an attempted incorporation are State v. Walthal. 124 Fla. 866, 169 So. 552 and Webb v. Hillsborough County, 175 So. 874.

We refer again to State v. Cedar Key, supra, where the opinion expressly recognizes that the City of Cedar Key was de facto although the Circuit Court had held that the charter acts were absolutely null and void. We cite also Comanche County v. Lewis 133 U. S. 198, 33 L. Ed. 604. In that case stress was laid on the fact that the Legislature had subsequently recognized the existence of the county. The Florida Legislature has also recognized the existence of the town of Miami Shores by enacting Chapter 13103 of the Acts of 1927 changing its name to North Miami, making the act dependent upon a referendum. In 1929 it enacted Chapter 14237 which validated the sale of the bonds dated January 1st, 1927 and also validated the expenditure of the proceeds derived from the sale of the bonds. It gave authority to the town to spend the balance of the proceeds for any valid municipal purpose. This act also was subject to a referendum. At the 1931 session it enacted Chapters 15347 and 15822, which authorized the town to compromise special assessments and all taxes which were delinquent prior to 1931 and Chap. 15823. No distinction was made between property East of the Bay and property West of the Bay. The same Legislature also enacted Chapter 15688 which abolished the town; subject to a referendum vote. Section 2 of that act specifically recited that the town had issued bonds and, in accordance with the provisions of the Florida Constitution, authorized and required the County Commissioners of Dade County to levy and collect taxes on property which was within the town for the payment of such bonds and even authorized the Commissioners to issue refunding bonds.

No limitation was placed upon the power of the County Commissioners to levy taxes on lands East of the Bay Biscayne.

The acts of 1929 are particularly important also because they were passed before quo warranto proceedings were instituted in July, 1929. These acts, recognizing the existence of the town, validating the bonds, and the expenditure of the money, authorizing the compromise of the taxes, providing for payments of its debts and the levy of taxes for that purpose, especially where they were subject to a referendum of all voters, constituted recognition by the Legislature of the existence of the town, and, as held in the Lewis case, supra, made a de jure corporation out of what had been before a "de facto corporation," even if the town were not de jure in its origin. The opinion of the majority of the Court of Appeals, analyzing the evidence and the decision of the Florida Court in the Mahood case to show that a town including lands on both sides of a bay could be incorporated under the act, leaves nothing that can be added.

If the right of taxpayers to be excluded from municipalities can be lost by their laches, neglect or acquiescence as against the town itself even though they be relators in an action brought by the attorney general, there is all the more reason why their rights under similar circumstances can be and should be regarded as lost as against bona fide holders of bonds.

The finding of fact by the Chancellor, affirmed by the majority opinion of the Court of Appeals that plaintiffs have estopped themselves by their actions and are precluded from raising the question of the legality of inclusion of their lands within the limits of the town against actions of bondholders should be conclusive on this subject.

POINT E

Dissenting Opinion Is Based Upon Erroneous Assumptions of Fact and Law

Before concluding we desire to discuss briefly the dissenting opinion of Judge Sibley. The primary error found in his opinion is the assumption that the

> "buyer (bond) may not have investigated the boundaries at all, or they may have known, as indeed they were bound to know, that the Florida law did not allow non-contiguous lands to be taken into a self-incorporated town,"

and

> "that the bond buying public should have known that there was no authority in law for including the land on the East side of the Bay."

The assumption that the bond buying public or the bond buyers should have *known the facts* is materially different from the assumption that they should have *known the law.* This Court in Comanche County v. Lewis, supra, said:

> "It is true that the present inhabitants have been wronged by the fraudulent acts of these conspirators in 1873-74, and it is a hardship for them to be bound for debts they did not contract and from which they received no benefit; but, on the other hand, it would be an equal hardship to the plaintiff to lose the money he has invested in the securities placed on the market, whose validity was attested to the fullest extent by both the executive and legislative departments of the State. When both of those departments give notice to the world that a county within the territorial limits of the State has been duly organized and exists with full power of contracting, can it be that a purchaser cannot in open market safely purchase the securities of that county? Does the duty rest on him to traverse the limits of the county and make personal inspection of the number of inhabitants? If any wrong has been done to the County

> through the want of attention on the part of the state authorities, equity would suggest that the State should bear the burden, and not cast it upon an innocent party residing far from the state and acting in reliance upon what it has done."

Judge Sibley's assumption is, therefore, directly opposed to the assumption of this Court.

Judge Sibley's statement of the law of Florida is also in error. The law did not and does not prohibit *noncontiguous lands* to be taken into a self-incorporated town *except when such lands were not a part of the community, village or hamlet* which was seeking to incorporate.

The result of Judge Sibley's assumption would be that the bondholders are presumed to have known not only that Bay Biscayne divided the town into two parts, but that the community, village or hamlet seeking incorporation was not located *on both sides of the Bay*. As the opinion of Judge Hutchinson points out, the Supreme Court of Florida did not hold that if the community had existed on both sides of the Bay the entire area could not have been legally incorporated. This Court asked

> "Does the duty rest on him (the bondholder) to traverse the limits of the town and make personal inspection of the inhabitants?"

Unless this question is answered in the affirmative, prospective bondholders can not be charged with notice or knowledge of the invalidity of the inclusion of any particular land. But in the face of acquiescence by property owners for a period of years and decrees by the judicial department of the State of Florida validating the bonds and a legislative validation of one issue and recognition of the town's existence by the legislature referring to the electors the question of whether certain acts should be operative, prospective purchasers of the bonds had every reason for presuming that no such question existed. Judge Ritter's opinion followed this reasoning and held that as between the

bondholders and the property owners the latter should suffer because of their participation and acquiescence in the pledges made by the town.

Judge Sibley also erred in the assumption that

> "the Supreme Court of Florida many years before (the issue of the bonds) had construed the statute and held that it did not authorize the inclusion of any but lands contiguous to the village or hamlet,"

citing Town of Enterprise v. State 29 Fla. 128, 10 So. 740. The error in this assumption is two-fold. First, because the lands East of the Bay Biscayne were not *noncontiguous*. They were only separted by a body of water and Section 2935 C. G. L. 1927 of the statutes of Florida expressly gave to the town jurisdiction over such waters.

This section was formerly Section 4 of Chap. 1855, Acts of 1871 and was an amendment to Chapter 1688, Acts of 1869 which was the general law under which the town was incorporated.

But the Enterprise decision did not rest upon the fact that the lands were "noncontiguous." The opinion shows that attempt was made to include a tract on mile square with a tract four miles square which was located five miles distant. The Court repeatedly referred to these tracts as being "detached." It said that the act was "an attempt to incorporate *two distinct detached tracts of land*," that "the idea of a municipal government, with *outlying detached municipal provinces*" was not justified; that the incorporation was void because it attempted to include "two distinct and detached tracts of land", and that it sought to incorporate "*two detached territories under one government*". The prime reason for the decision is found in the statement that this *could not be done because "the machinery of government provided by the* statute is inapplicable to such a state of affairs." A town could not under the statute function over two *detached* tracts. It could not even condemn a right-of-way from one tract to the other. No such difficulty is found in this case where only a body of water intervenes.

It is a well known fact that in Florida and elsewhere many towns and cities incorporated by special act and under general laws include waters navigable and otherwise within their limits. The Florida Supreme Court admitted that there was no constitutional bar to the existence of such a town as the majority opinion of the Court of Appeals clearly points out.

Nor is the Enterprise decision authority for the power of a state court to detach or exclude a part of the area of a town. On the contrary the Court expressly held that the *entire act of incorporation was void.* Even the Petitioners admit that a town does exist de jure, and the record is conclusive that the town did exist de facto over the entire area, and the validation decree necessarily held that it existed de jure. The Court could not have validated bonds unless there was a de jure authority to issue them. As it has so held, that decree could not be questioned. The decree of validation is res adjudicata that the town legally existed and had the power to issue bonds. The Court could not, thereafter hold to the contrary in an action by bondholders who purchased in reliance upon such adjudication. The Cedar Key decision so holds.

We also call to the attention of the Court the fact that no bonds had been issued by the town of Enterprise, no bondholders were parties and the case could not even have adjudicated the effect of a decree of ouster upon the rights of bondholders.

The suggestion of Judge Sibley that the liability of the two areas should be adjusted on an equitable basis cannot be justified in the light of Chapter 14237, Acts of 1929 which validated the sale of the bonds, the expenditures which had been made and authorized further expenditures of the proceeds for such municipal purposes as the officials should determine.

CONCLUSION

In conclusion we submit that the prime equity of this bill is found in the fact that the Petitioners seek to give to the decree of the State Court an effect which would, under the admitted allegations of the bill destroy the value of the securities issued. In Payne v. First National Bank, supra, the Texas Court said that

> "such an interpretation (permitting judgment of ouster to impair the obligations of contracts) would render its provisions (of the State Constitution and all statutes governing jurisdiction in quo warranto) obnoxious to the clause of the Federal Constitution inhibiting the passage of laws having that effect;"

that it limited the legal effect of a quo warranto judgment, where no provision was made for the payment of existing indebtedness, to deprive the officers of all powers *"except such as were necessary for the protection of creditors."* This is the holding of the Florida Court. State v. Cedar Key, supra.

The power of Federal Courts to protect non-residents against the effect of decisions by State Courts in cases to which they were not parties and which would defeat and destroy their rights was asserted in Fetzer v. Johnson 15 Fed. (2nd) 145 (certiorari denied by this Court 273 U. S. 751, 71 L. Ed. 873) where the Eighth Circuit Court of Appeals enjoined a judgment of the Supreme Court of Oklahoma holding a drainage district void. The decision of the Circuit Court was based upon the principle announced in Wells Fargo v. Taylor 254 U. S. 175, 65 L. Ed. 205, that

> "a Federal Court of equity will by its writ of injunction, deprive one of the benefit of a judgment obtained in a State Court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience."

That the judgment and decree of the State Court if given the effect urged by Petitioner would violate these principles cannot be denied. The mere fact that a decree of the

Federal Court will produce a conflict with decrees of the State Courts is not in itself sufficient to prevent this Court from granting the relief to which Complainants are otherwise entitled, though we admit that such conflicts are to be avoided where possible.

We submit, therefore, that under the first phase of the case, the peremptory writ should be enforced and action by the town officers taken pursuant thereto should be protected against outside interference even under decrees of the State Court; that under the second phase of the bill the bondholders are entitled to protect the contracts made by the town with them with at least the implied consent and acquiescence of the Petitioners, and which were validated by the State Court and recognized by the State Legislature. Whether we regard the rights of the bondholders as having been finally adjudicated by the validation decrees or whether the property owners East of the Bay be held estopped from asserting their rights by reason of the facts and circumstances which have been proved, or whether we regard the town prior to the judgment of ouster as existing de facto throughout the entire corporate limits as defined by the act of organization, we reach the same result. Contracts made by the town under its apparent and assumed authority, which were not questioned until after the rights of innocent third parties had accrued, should be enforced according to their terms wherever such enforcement is necessary to the protection of the creditors. Or, to state it in a negative way, property owners whose lands may have been illegally included should not, under the facts of this case, be permitted to assert such illegality as against the claims of creditors acquired in good faith unless it is affirmatively made to appear that liability of such lands is not necessary for the protection of the creditors' rights. The effort of Petitioners is to accomplish by indirection results which the Constitution of the United States and the Constitution of Florida prohibit, namely, the destruction of vested interests and contract rights. Admittedly this could not have been done

by the Legislature or under its authority after such rights have accrued, because of Section 10, Article I of the Constitution of the United States, and Section 17 of the Declaration of Rights of the Constitution of Florida. We submit that such cannot be accomplished indirectly by the use of the State writ of quo warranto to which creditors were not a party, where the contracts were made in good faith before such action was instituted, in reliance upon the state of affairs existing within the town; where the bonds contained pledges by the officials, had been validated by the Courts of Florida and the existence of the obligations has been recognized by town and the Legislature.

We assert that the judgment of ouster operates only prospectively and does not affect the rights of such creditors; that this case must be decided upon the facts and circumstances disclosed, and is not controlled or even influenced by decisions of the Florida Court relating to Miami Shores to which no bondholder was a party and which were not made until long after rights had become fixed.

Respectfully submitted,
GILES J. PATTERSON,

Solicitor for Respondents
The Brown Crummer Investment
Company, Town of North Miami,
Et Al.